No. 92-166

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

KEENE CORPORATION,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of businesses, companies, and associations in the world. With substantial membership in each of the fifty states, the Chamber represents more than 200,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in critical issues before the Supreme Court of the United States, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. The Chamber also seeks to advance those interests by filing briefs in cases of importance to the business community.

Many of the Chamber's members are large and small businesses which have extensive relationships with federal government agencies. For a variety of reasons, these members may have monetary or equitable claims against the government. Thus, the primary issue presented by this case, i.e., whether claimants against the United States government will be prevented from seeking full relief in appropriate courts due to the Court of Appeals for the Federal Circuit's restrictive view of 28 U.S.C. § 1500 (1988) (to be codified as amended at 28 U.S.C. § 1500 (1992)) ("Section 1500"), is of great concern to Chamber members. The membership of the Chamber takes issue with the government's position that Section 1500 should force claimants to make a pre-filing election between monetary claims that may be heard only in the Court of Federal Claims ("Claims Court"), and claims for equitable relief that in most instances must be heard in federal district court. In the Chamber's view, such a reading of Section 1500 is unsupported by its language, its legislative history, and its interpretation by the courts over a period of decades.

The preservation and protection of claims against the government is a critical cornerstone of due process law. Moreover, Congress has waived sovereign immunity under statutes such as the Tucker Act, the Federal Tort Claims Act ("FTCA") and the Administrative Procedure Act ("APA"), to induce Chamber members and many other entities to enter into voluntary relationships with the government including contracts. Potential claimants have relied on having access to the courts in a variety of actions to vindicate their interests, and any interpretation of Section 1500 that denies claimants access to the appropriate federal courts may amount to a denial of due process.

SUMMARY OF ARGUMENT

Until the instant case, the essential meaning of Section 1500 was unchanged for more than a century: claimants against the United States are precluded from pursuing similar relief in two courts at once. Now, in

UNR Industries, Inc. v. United States, 962 F.2d 1013 (Fed. Cir.), *cert. granted sub nom. Keene Corp. v. United States*, 113 S. Ct. 373 (1992) ("*UNR*"), a Federal Circuit *en banc* panel has radically redefined Section 1500 in a manner that limits access to the courts for all government claimants.

In addition to redefining wholly the concept of "pending," the *UNR* panel rewrote the meaning of the word "claim." Under the well-developed pre-*UNR* law, a "claim" is any effort to seek a nonduplicative remedy in a court of appropriate jurisdiction. By judicial fiat, the *UNR* panel has decided a "claim" now means any cause of action, theory of recovery, or remedy based on similar "operative facts," even if the claimant seeks relief available only from different courts. Thus, a litigant prosecuting a monetary claim in Claims Court must forego access to all other courts on any related issue while his case is pending, *even if relief is not available in Claims Court*. A claimant seeking equitable relief from the district court for any reason, even to preserve the status quo pending the outcome of his Claims Court action, will have his action dismissed.

Congress did not intend such a result. The legislative history of Section 1500 and Congress' recent passage of transfer statutes illustrate that Congress' intent in 1868 and today is to have valid causes of action heard on the merits, rather than dismissed through procedural roadblocks. Moreover, since Congress has waived sovereign immunity through statutes such as the Tucker Act, the APA and the FTCA, due process requires a reasonably appropriate forum to vindicate meritorious claims. The Federal Circuit's reading of Section 1500, which forces claimants to choose between prosecuting money claims and seeking all other non-monetary relief, does not meet the requirements of due process.*

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* Petitioner Keene Corporation and Respondent United States of America have consented to the filing of this amicus brief. Their respective letters of consent are filed herewith.

ARGUMENT

I. THE *UNR* PANEL'S RESTRICTIVE DEFINITION OF A "CLAIM" WOULD DEPRIVE CLAIMANTS OF THE ABILITY TO SEEK BOTH EQUITABLE AND LEGAL RELIEF, RESULTING IN DEPRIVATION OF DUE PROCESS.

A. The *UNR* Panel Erred In Interpreting "Claim" To Include Actions For Both Legal And Equitable Relief.

The *UNR* panel redefined "claim" as "whatever theories that arise from the same operative facts." *UNR*, 962 F.2d at 1023 (quotations omitted). In so doing, the *UNR* panel purported to adopt the "operative facts" test set forth in *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1567 (Fed. Cir. 1988) (per curiam), *cert. denied*, 489 U.S. 1066 (1989). While the *UNR* panel used the same words employed by the *Johns-Manville* court, it resolutely ignored all nuance in the *Johns-Manville* opinion, and expressly overruled *Casman v. United States*, 135 Ct. Cl. 647 (1956), a case upon which the logic of *Johns-Manville* rests. In so doing, the *UNR* panel destroyed the careful and logical judicial development of Section 1500 and replaced it with a drastic rule of procrustean uniformity.

1. *The* UNR *Panel Creates A "Catch 22" Which Prevents Claimants From Seeking The Relief Congress Intended Them To Have.*

Casman stands for the proposition that a claim is defined by any fact situation in which nonduplicative relief is sought. In *Casman*, the Court of Claims, the Article 1 predecessor to the Federal Circuit, determined that a district court claimant seeking reinstatement to a federal job should not have his Court of Claims action for backpay dismissed. Citing the legislative history, the Court of Claims determined that Section 1500 was intended to force an election among courts that could determine the same claim. 135 Ct. Cl. at 649. If, however, the theories of relief sought in the two courts "are totally different" Section 1500 does not apply:

> Since plaintiff has no right to elect between two courts, [Section 1500] is inapplicable in this case. To hold otherwise would be to say to plaintiff, "If you want your job back you must forget your back pay;" conversely, "If you want your back pay you cannot have your job back." Certainly that is not the language of the statute nor the intent of Congress.

Id. at 650.

The *Casman* rule was reaffirmed in *City of Santa Clara v. United States*, 215 Ct. Cl. 890 (1977), in which the Court of Claims again determined that a suit in district court for injunctive relief could not preclude a suit in the Court of Claims for money damages:

> Although plaintiff's claim here is based on the same governmental action as is its suit in the district court, plaintiff has, in a strict legal sense, requested a remedy here that is totally unavailable in district court. . . . *We do not believe that plaintiff should be denied the right ever to claim money damages merely because it also seeks to enjoin [future government action]*. We conclude, therefore, that jurisdiction in this court is not precluded by [Section 1500].

Id. at 892-93 (emphasis added) (citation omitted).[1]

In *Johns-Manville*, the Federal Circuit expressly accepted *Casman* and *Santa Clara* in addressing what facts and legal theories constituted a "claim" under Section

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[1] *Accord Cantieri Rovina v. United States*, 10 Cl. Ct. 634, 640-41 (1986) (Section 1500 not triggered if "dissimilar" relief is sought in separate case); *Truckee-Carson Irrigation Dist. v. United States*, 223 Ct. Cl. 684, 685 (1980) (same); *Pitt River Home & Agric. Coop. Ass'n v. United States*, 215 Ct. Cl. 959, 961 (1977) (same); *Scott Aviation v. United States*, 23 Cl. Ct. 573, 575 (1991) (claims are identical if they arise from the same operative facts and seek the same kind of relief) (citing *Johns-Manville*, 855 F.2d at 1562).

1500. Finding no express definition of "claim" in the language or legislative history of Section 1500, the *Johns-Manville* court found the situation Congress wanted to remedy (i.e., Southern planters bringing "cotton claims" in multiple courts) involved duplicative claims for money judgment brought on different legal theories, and concluded that legal theories are not necessarily "claims." 855 F.2d at 1561.

In reaching this conclusion, the *Johns-Manville* court cited, *inter alia*, *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438, 440 (1939), *cert. denied*, 310 U.S. 627 (1940), for the proposition that:

> the operative facts relied upon by a claimant [do] not state two separate and distinct causes of action *merely because such facts may set up a liability both in tort and contract*. . . . We think it is clear that the word "claim," as used in section 154 [now Section 1500] . . . has no reference to the legal theory upon which a claimant seeks to enforce his demand. . . .

855 F.2d at 1562 (emphasis added) (quoting *British American Tobacco Co.*, 89 Ct. Cl. at 440). The *Johns-Manville* court also cited *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 152 F. Supp. 236, 238, 138 Ct. Cl. 648 (1957), in which the Court of Claims found that actions for recovery of taxes on theories of overpayment (district court) and account stated (Court of Claims) constituted only one claim—for refund of the taxes—that should be dismissed under Section 1500. 855 F.2d at 1562.

The *Johns-Manville* court agreed that a district court tort action would preclude a later Claims Court contract action if they were "duplicative actions on the same operative facts." *Id.* at 1563. However, the *Johns-Manville* court also cited *Casman*, *Truckee-Carson* and *Santa Clara* as establishing that Section 1500 does not apply when nonduplicative *relief* is sought in several courts. *Id.* at 1563 n.9. Thus, under *Johns-Manville*, a lawsuit addressed to a court of appropriate (and unique) jurisdiction is a separate claim if the relief sought is not duplicative.

The *Johns-Manville* court determined that the contract and tort causes of action alleged by the appellant in that case were duplicative because (1) the "operative facts" alleged were the same, and (2) the relief sought (i.e., recovery for costs and other damages connected to suits against Johns-Manville for asbestos injuries) was also identical. *Id.* at 1563. The theories of liability (i.e., tort and contract) were irrelevant, since a claim is defined by the facts alleged and the relief sought, "not the legal theories raised." *Id.* Thus, under *Johns-Manville*, Section 1500 is not implicated in cases brought under theories of both tort and contract, provided the facts were different *or* the relief sought was not duplicative.

Ignoring this careful reasoning, the *UNR* panel, claiming to "reaffirm" *Johns-Manville*, employed a brutally simplistic, historically inaccurate definition of "claim" requiring claimants to make outcome-determinative elections of remedies even before filing suit. *UNR*, 962 F.2d at 1023. In "reaffirming" statements the *Johns-Manville* court never made, the *UNR* panel engaged in an unwarranted revision of well-developed law.[2]

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[2] It is curious that the *UNR* panel, while claiming to reaffirm *Johns-Manville*, expressly overruled a Federal Circuit case following it. In *Boston Five Cents Sav. Bank v. United States*, 864 F.2d 137, 139 (Fed. Cir. 1988), *overruled by UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992), the Federal Circuit cites *Johns-Manville* for the proposition that Section 1500 is not applicable when "a type of relief not available in the Claims Court is sought in the other court." *Id.* (quoting *Johns-Manville*, 855 F.2d at 1568). On the logic of *Johns-Manville*, the *Boston Five Cents* court concluded that "because different types of relief are sought, jurisdiction over the monetary claim lies in the Claims Court." *Id.*

The *UNR* panel's revision of Section 1500 exalts form over substance. In its desire to present a tidy resolution of a complex issue, it presents government claimants with a Hobson's choice fraught with unknowable and potentially devastating consequences. A claimant seeking monetary relief in the Claims Court must foreswear injunctive or declaratory relief, and trust his opponent, the government, not to change the status quo. Of course, should the claimant seek any equitable relief from the district court, the Claims Court will lose jurisdiction to hear his monetary claim. *UNR*, 962 F.2d at 1021.

Alternatively, a complainant may bring equitable claims in the district court under the FTCA or the APA, hoping for a final judgment in time to seek recovery under the six-year Tucker Act limitations period. Once again, the claimant must hope that the court calendar is clear, the judge is swift, the government is diligent, and the appeals court is prompt. Events beyond the claimant's control will determine whether his claims are ever heard on the merits.

The application of the *UNR* panel's reasoning to the facts of *Casman* shows its practical effect. Under the *UNR* rule, the *Casman* plaintiff could not seek both reinstatement to his former position and backpay. If he wanted backpay, he must sue in Claims Court and foreswear all other courts. Alternatively, should he decide to seek reinstatement, he would have to sue in district court, effectively foregoing monetary relief. He could, theoretically, sue first for reinstatement, then for backpay. But given the backlog in the courts and the government's new ability to block the courthouse doors by the mere filing of an appeal or a petition for a writ of certiorari, *see UNR*, 962 F.2d at 1021, his ability to prosecute both legal and equitable claims would be based more on chance than on the legal merits of his arguments.

In a perverse twist, under the *UNR* panel's view of Section 1500, a claimant's access to the courts would be

largely based on the activities of the government. If a plaintiff tried to seek equitable relief in district court followed by a Claims Court monetary claim, the government has every incentive to stall the district court action to block access to a monetary claim. Delay, rather than good faith litigation, would become the government's best ally, since delaying a monetary claim long enough bars a hearing on the merits.

Even more ominously, the *UNR* panel's reading of Section 1500 creates a strategic incentive for the government to whipsaw claimants between several courts or to force a claimant to appear in an action that would destroy the jurisdiction of the claimant's chosen forum. For example, in *Nevada Power Co. v. United States*, 229 Ct. Cl. 783 (1982), a claimant sued in district court to have government regulations declared invalid, and in the Court of Claims for return of monies wrongly collected under the regulations. The district court found the regulations invalid. The Court of Claims accepted jurisdiction and stayed the proceedings pending the outcome of appeals of the district court judgment. *Id.* at 785.

Under the *UNR* rule, such a district court victory would be pyrrhic. The claimant's money claim (and, potentially, the money claims of all others who might seek recovery on the same legal theory) would be dismissed under Section 1500 because the district court action, in which claimant established his right to recovery, was still on appeal. Thus, under *UNR*, even if a claimant can establish that the government regulations under which he made payments were invalid, he may not seek monetary relief until that judgment is final. All the government must do is wait the claimant out through appeals and petitions for writs of certiorari until the limitations period for money claims has passed.[3]

[3] Ironically, the more important the issue, the more likely this is to happen, since the government is more likely to appeal "impact" cases or cases involving large amounts of money.

2. *The* UNR *Panel Failed To Consider The Extremely Limited Power Of The Claims Court To Grant Relief.*

In overruling *Casman*, the *UNR* panel failed to consider *Casman*'s basic point: that a court of limited jurisdiction such as the Court of Claims (or Claims Court) is constrained in its ability to provide relief to plaintiffs, and thus should not be a barrier to relief in other courts.[4] *Casman*, 135 Ct. Cl. at 650.

This Court has clearly spoken to this precise issue. In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Court considered whether the APA (5 U.S.C. § 702 (1988)), in conjunction with 28 U.S.C. § 1331 (1988), permitted the district court to consider a state's complaint that the Secretary of Health and Human Services ("HHS") wrongly withheld Medicaid payments. HHS claimed that because the state allegedly sought "money damages," jurisdiction rested solely with the Claims Court pursuant to the Tucker Act. 487 U.S. at 887, 890 n.14.

This Court disagreed. While the Court found it "clear" that Congress did not intend the grant of review under the APA to duplicate existing procedures for judicial review of agency action, it also found that the ability of the Claims Court to provide "money damages" was an inadequate remedy since it did not have "the general equitable powers of a district court to grant prospective relief." *Id.* at 905. The Court said "[w]e are not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief." *Id.* Given the "doubtful and limited" relief available in the Claims Court, having access to the Claims Court was an inadequate

[4] The logic and continued vitality of this argument was highlighted by the Claims Court's opinion in *Security Sav. & Loan Ass'n v. United States*, 26 Cl. Ct. 1000 (1992), in which Chief Judge Smith underscored the court's limited jurisdiction and inability to grant injunctions under the All Writs Act.

substitute for district court review. *Id.* at 901. Indeed, the Court was untroubled by the possibility that some of the relief sought in district court could have been sought in the Claims Court: "the fact that the purely monetary aspects of the case could have been decided in the Claims Court is not a sufficient reason to bar that aspect of the relief available in a district court." *Id.* at 910-11 n.48.[5]

Notwithstanding the intricacies of its facts, *Bowen* has a clear message: the Claims Court can provide only limited relief, and many injuries that arise as a result of wrongful governmental action, and for which the government has waived its sovereign immunity, cannot be addressed there. To address these injuries fully, claimants must be provided with access to appropriate courts.

A clear discussion of this issue took place in *Sharp v. Weinberger*, 798 F.2d 1521 (D.C. Cir. 1986). In an opinion by then-Circuit Judge Scalia, the court considered whether an Air Force Ready Reserve officer who made constitutional and equitable claims pursuant to his employment contract could bring his claims in district court. *Id.* at 1521-23. While stating that jurisdiction for money damages related to government contracts could be heard only in the Claims Court if they involved claims in excess of $10,000, the court determined that, under the APA, the district court properly took jurisdiction over Sharp's constitutional and equitable claims.[6] *Id.* at 1523-24. *See also Transohio Sav. Bank v. OTS*, 967 F.2d 598,

[5] We see a struggle emerging between the courts of limited jurisdiction and those of general jurisdiction to satisfy the needs of claimants against the United States. This is particularly true where the "claims" may encompass both monetary and non-monetary relief or where the availability of monetary relief may be uncertain. *See* discussion *infra* and *see, e.g., Hubbard v. EPA*, No. 90-5233 (D.C. Cir. Nov. 27, 1992) (en banc).

[6] The *Sharp* panel also concluded that money damages were the only contractual remedy available to Sharp, since Congress has not authorized other remedies. 798 F.2d at 1523-24.

610 (D.C. Cir. 1992) (claims for damages must be brought in Claims Court, but statutory and constitutional claims related to the existence of the contract may be brought in district court); *Southeast Kansas Community Action Prog., Inc. v. Lyng*, 967 F.2d 1452, 1456 (10th Cir. 1992) (same); *Hamilton Stores, Inc. v. Hodel*, 925 F.2d 1272, 1279 n.14 (10th Cir. 1991) (same); *Spectrum Leasing Corp. v. United States*, 764 F.2d 891, 895 n.6 (D.C. Cir. 1985) (specific performance and damages are not equivalent remedies, even if the specific remedy involves payment of money); *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1100-01 (9th Cir. 1990) (due process claims for taking of property that Claims Court will not hear may be heard in district court, even if the Claims Court has statutory authority to hear them).

In the light of these strong judicial statements that claimants should be given access to courts which can grant them relief, the *UNR* panel's reading of Section 1500 stands in sharp contrast. Given Congress' provision of relief for meritorious monetary, tort and equitable claims against the government and the clear guidance of this Court that claimants are not to be denied access to the courts that may grant them relief, the restrictive statement of the *UNR* panel must be reversed.

B. The *UNR* Panel's Restrictive Reading Of Section 1500 Denies Claimants An Opportunity To Seek Redress, Resulting In A Denial Of Due Process.

As shown, the *en banc* panel's reading of Section 1500 would deny claimants access to the forums provided by Congress under, *inter alia*, the Tucker Act, the FTCA and the APA. Although Congress has made clear that the government may be sued for both monetary or non-monetary relief under these and other acts, *UNR* ensures that many such claims will never be heard by the courts, or at best, that fate dictated by timing rather than merit will determine their outcome.

The Due Process Clause forbids such a result. As this Court discussed at length in *Logan v. Zimmerman*, 455 U.S. 422, 428 (1982), it is settled that "a cause of action is a species of property" protected by due process. If the government grants a claimant a cause of action, it must also provide a forum in which that cause of action may be vindicated.

In *Zimmerman*, a complainant under a state fair employment practice act made a discrimination claim to a state commission in the manner required by statute, only to have the complaint dismissed when the commission did not hold a timely hearing. *Id.* at 427. The Illinois Supreme Court determined that the state's failure to hold a timely hearing rendered it powerless to address the discrimination claim. *Id.*

This Court reversed, based on its "traditional" view "that the Due Process Clause protect[s] civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* at 429. Since the *Zimmerman* complainant was denied a hearing on the merits for reasons beyond his control, he was entitled to a hearing in a forum that could provide him complete relief.[7]

This Court found that a property right to adjudicatory procedures was not novel. Quoting *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), the Court stated that the "'property' component of the Fifth Amendment's Due Process Clause" imposes "constitutional limitations upon the power of courts, even in aid of their own valid proc-

[7] In *Zimmerman*, the complainant had the option of seeking recovery from the state under an independent tort action. However, this Court found that a tort suit would not make the complainant whole, since the act governing claims against the state did not provide for reinstatement. *Id.* at 436-37. Likewise, the *UNR* panel's reading of Section 1500 condemns claimants to the unsatisfactory alternatives of seeking either monetary relief or equitable relief, but not both, since their monetary claims will be dismissed if equitable relief is sought in district court. *UNR*, 962 F.2d at 1021.

esses, to dismiss an action without affording a party the opportunity for the hearing on the merits of his cause." *Zimmerman*, 455 U.S. at 429 (quoting *Societe Internationale*, 357 U.S. at 209). Denying potential litigants use of established adjudicatory procedures offends due process, as it "den[ies] them an opportunity to be heard upon their claimed rights." *Zimmerman*, 455 U.S. at 430 (citing *Boddie v. Connecticut*, 401 U.S. 371, 390 (1971)).[8] *See also Barrett v. United States*, 689 F.2d 324, 332 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983) (FTCA cause of action is a property interest protected by the Due Process Clause).

That is the situation here. In an unwarranted display of judicial legislation, the *UNR* panel has erected a procedural limitation on the ability of claimants to seek appropriate relief. A government claimant's access will now be based on the complexity of his claim, the speed of the courts, and the good will of his adversary, the government. This is inadequate. "A system or procedure that deprives persons of their claims in a random manner . . . necessarily presents a unjustifiably high risk that meritorious claims will be terminated." *Zimmerman*, 455 U.S. at 434-35. The situation legislated by the *UNR* panel is worse than random, since it gives government agencies opposing claims not only the incentive to take action to keep claimants' demands for monetary relief out of Claims Court, but also the affirmative power to do so.

There is no doubt that Congress may determine whether and in what manner it waives the sovereign immunity of the United States. *Maricopa County v. Valley Bank*, 318 U.S. 357, 362 (1942) (Congress may change the terms under which government may be sued); *Lynch v. United States*, 292 U.S. 571, 581 (1934) (consent to sue

[8] In *Martinez v. California*, 444 U.S. 277, 281-82 (1980), this Court stated that "[a]rguably, the cause of action [for wrongful death] that the State has created is a species of property protected by the Due Process Clause."

United States is revokable). However, Section 1500 is neither a waiver of sovereign immunity nor a limitation on the waivers clearly expressed in statutes such as the FTCA, the APA and the Tucker Act. Rather, as passed and accepted by Congress for more than a century, Section 1500 is a procedural, jurisdiction-limiting tool to help the courts order their business and prevent multiple hearings on the merits of the same claims. As such, the courts may not use Section 1500 as a sword to cut off meritorious causes of action. The *UNR* panel's unsupported interpretation of Section 1500 denies claimants the court access Congress guaranteed in, *inter alia*, the Tucker Act and the FTCA.

II. CONGRESS' INTENT IN PASSING SECTION 1500 WAS TO AVOID RETRYING IDENTICAL CASES, NOT TO AVOID LEGITIMATE CLAIMS.

A. Congress Passed Section 1500 To Avoid Duplicative Claims In Multiple Courts.

The *UNR* panel termed the statutory history of Section 1500 "fairly straightforward." *UNR*, 962 F.2d at 1017. Nevertheless, it rewrote Section 1500 without considering what the word "claim" meant when the original statute was written, nor what, with Congress' blessing, it has meant in the 120 years since. In contrast, the analysis of Section 1500 in *Casman* and its progeny is consistent with Congress' intent to require a litigant to elect a single forum in which to seek a given remedy.

Senator George Edmonds, author of the 1868 version of Section 1500, explained its purpose:

> The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute

> their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I'm sure everybody will agree with that.

Cong. Globe, 40th Cong., 2d Sess. 2769 (1868), *quoted in Johns-Manville*, 855 F.2d 1556, 1560.

This statement must be read in historical context. In 1868, res judicata did not bar retrial of the same cotton claim brought against a federal officer (in district court) and the United States (in the Court of Claims). *Matson Navigation v. United States*, 284 U.S. 352, 356 (1932).[9] A cotton claimant who lost in district court on a theory of conversion could have a second trial for reimbursement for the same cotton in the Court of Claims under the Captured and Abandoned Property Act of 1863. According to its author, Section 1500 was intended to prevent such duplicative trials. There is no indication whatsoever that Congress intended to limit claims seeking completely different relief. In taking action that Congress could have taken, but did not, the *UNR* panel decided that Section 1500 should mean something completely different than Congress intended.

B. The 1982 and 1988 Federal Transfer Statutes Illustrate That Congress' Intent Was To Have Meritorious Claims Determined On The Merits.

The Chamber's interpretation of the congressional intent in passing Section 1500 and in accepting judicial

[9] This Court said: "the declared purpose of the section was only to require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be res adjudicata in the suit pending in the Court of Claims." 284 U.S. at 355-56 (citations omitted).

interpretations of Section 1500 since *Casman* is bolstered by Congress' expressed concerns in passing the transfer provisions of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 301, 96 Stat. 55 (1982) (codified at 28 U.S.C. § 1631 (1988)), and a related transfer provision in the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 501, 102 Stat. 4642 (1988) (codified as amended at 28 U.S.C. § 1292 (d)(4)(B) (1992)).

Under 28 U.S.C. § 1631, when a civil action or appeal is filed in a district court, court of appeals, Claims Court or the Court of International Trade, and the court of filing is without jurisdiction, "the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed," to proceed as if it had been originally filed in the appropriate court. 28 U.S.C. § 1631.

This statute illustrates a clear congressional intent that the mere forum of filing (i.e., a suit for monetary damages in the district court) should not be an outcome-determinative event even if, in retrospect, the wrong court is chosen. This logic, extended to the *UNR* action, indicates that Congress was concerned about claims being lost because of the "unnecessary risk" to litigants created by the overlapping jurisdiction of specialized courts.

The legislative history of the transfer statute supports a broad reading of Congress' intent:

> Much confusion has been engendered by provisions of existing law that leave unclear which of two or more federal courts including courts at both the trial and appellate level—have subject matter jurisdiction over certain categories of civil actions. The problem has been particularly acute in the area of administrative law where misfilings and dual filings have become commonplace. The uncertainty in some statutes regarding which court has review authority *creates an unnecessary risk that a litigant may find*

himself without a remedy because of a lawyer's error or a technicality of procedure.

. . . .

. . . This provision is broadly drafted to allow transfer between any two Federal Courts.

S. Rep. No. 275, 97th Cong., 2d Sess. 11, 30 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 21, 40 (emphasis added). Thus, it was Congress' clear intent that mistakes or legal uncertainties regarding the proper court in which to file an action were to be ignored. "[T]echnicalit[ies] of procedure" are not to eclipse the importance of the merits of a claim. *Id.* at 21.

The judicial interpretation of Section 1631 is also relevant. In some instances, the Claims Court has determined that the statute supports the bifurcation of claims between the Claims Court and district court. *See Hicks v. United States*, 23 Cl. Ct. 647, 653 (1991) (Claims Court retains jurisdiction over claim for recovery of interest paid while transferring claims for liquidated damages, statutory violations and injunctive relief to district court); *Froudi v. United States*, 22 Cl. Ct. 290, 298-99 (1991) (Claims Court retains jurisdiction over just compensation claim while transferring claims in equity to district court).[10] Cases such as these reflect Congress' broad intention to provide access to appropriate courts.

The passage of 28 U.S.C. § 1292(d)(4)(B) is further unmistakable evidence that Congress intended claimants to have access to courts with the power to grant appropriate relief. This section provides that when a motion is filed to transfer an action from the district court to the Claims Court, the action will be stayed for sixty days after the district court rules on the motion, in order to permit an appeal of an adverse decision. Moreover, and critically, the section also provides that the

[10] *But see Deems Lewis McKinley v. United States*, 14 Cl. Ct. 418, 420 (1988) (Claims Court refuses to bifurcate plaintiff's claims).

stay "shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary." *Id.* In other words, claimants against the government can seek and be granted necessary equitable remedies from the district court *even if their case is ultimately found to be solely within the jurisdiction of the Claims Court.*

Congress' reasoning in passing this section is clearly expressed in the legislative history, in which Congress expressed concern that claimants not lose rights while issues of jurisdiction are considered:

> [The stay] would not bar the granting of preliminary or interim relief under circumstances where it would otherwise be appropriate and where expedition is reasonably necessary. In some cases, a delay of even sixty days could serve to deprive a litigant of important rights or even the primary objective of the litigat[i]on.

H.R. Rep. No. 889, 100th Cong., 2d Sess. 53 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6013.

The application of this clear intent to the present situation is obvious. Congress does not intend, and has taken clear steps to prevent, precisely the outcome the government urges in *UNR*. Under the transfer statutes, the filing of an action in a court that is ultimately determined to be without jurisdiction will not destroy the cause of action in the appropriate court. Thus, Congress clearly endorsed the *Boston Five Cents* rule that monetary claims filed in district court do not deprive the appropriate court (i.e., the Claims Court) of jurisdiction to hear the case. The amendments to 28 U.S.C. § 1292 specifically empowering the district courts to provide equitable relief in cases being transferred to the Claims Court indicate that Congress wanted claimants to have access to the equitable powers of the district court, even if the claims ultimately were within the sole jurisdiction of the

Claims Court. The *en banc* opinion is inconsistent with Congress' express wishes and should be reversed.

CONCLUSION

The *UNR* decision is an unwarranted example of judicial legislation. The interpretation of Section 1500 developed by the *UNR* panel is unsupported by Section 1500's history and is inconsistent with Congress' intent that claimants against the government have access to appropriate courts, and is particularly egregious in light of the Claims Court's extremely limited power to provide appropriate remedies. The Chamber of Commerce of the United States of America respectfully urges this Court to reverse the decision of the *UNR* panel.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 1500

Pendency of claims in other courts

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.